No. 10

In the Supreme Court of the United States

OCTOBER TERM, 1939

M. LUTHER PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE CITY, PETITIONER

v.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR THE RESPONDENT

★10-2-39

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Maryland (R. 19–23) is not yet officially reported. The memorandum opinion of the Baltimore City Court (R. 9–17) is not reported.

JURISDICTION

The order of the Court of Appeals of the State of Maryland was entered on December 1, 1938 (R. 18). Petition for writ of certiorari was filed Feb-

ruary 25, 1939, and was granted April 17, 1939 (R. 24). The jurisdiction of this Court rests upon Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a mortgage executed to the Home Owners' Loan Corporation is subject to state documentary and recording taxes.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 63–67. The full text of the sections of the Home Owners' Loan Act of 1933 which deal with the H. O. L. C. are printed in the Appendix to the petitioner's brief, pp. 55–66.

STATEMENT

This action was instituted in the Baltimore City Court by the respondent's petition for a writ of mandamus (R. 1–5) to compel the petitioner, as Clerk of the Superior Court of Baltimore City, to receive and record a mortgage executed to the respondent upon payment of the usual recording fee, but without payment of the recording tax and affixation of the documentary stamps prescribed by the laws of the State of Maryland. The petitioner demurred to the respondent's petition for a writ of mandamus (R. 8). The Baltimore City Court overruled the petitioner's demurrer "with leave to answer within 30 days" (R. 9). The petitioner elected to stand upon his demurrer and filed no

answer to the respondent's petition for a writ of mandamus (R. 17).

The material facts as alleged in the petition for a writ of mandamus (R. 1–5) and admitted by the demurrer (R. 8) are as follows:

The Home Owners' Loan Corporation of Washington, D. C., the respondent, is a corporate instrumentality of the United States of America, organized, existing, and operating pursuant to Section 4 of the Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128, as amended (U. S. C., Title 12, Sec. 1463), whose entire capital stock is owned by the United States and as such has been operating in the several states and in the State of Maryland (R. 1.)

In the course of the respondent's operations, Martin J. Burns and Mary Burns, his wife, of Baltimore, Maryland, conveyed to it by the execution and delivery of a mortgage dated the 11th day of March, 1938 (R. 1, 5–8), a leasehold estate, renewable from time to time forever and subject to the payment of an annual ground rent of $42.25, in and to the dwelling property in Baltimore City, Maryland, known as No. 435 East 27th Street, to secure the repayment of an advance made by the respondent to the mortgagors of $110. This advance was made for the sole purpose of defraying the cost of repairs and reconditioning to the property conveyed which were necessary to preserve the property as security for an original loan made to the mortgagors by the respondent on July 11, 1934 (R. 2).

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In order to preserve and protect the respondent's lien and to enjoy the full benefits of the mortgage, it is a legal necessity under the laws of Maryland that the mortgage in question be recorded among the land records of the City of Baltimore as required and directed by the law of Maryland (R. 2).

The petitioner is the duly qualified Clerk of the Superior Court of Baltimore City, and under the provisions of Article 4, Section 38 of the Constitution of Maryland, as Clerk of the Superior Court of Baltimore City, is entrusted with the land records of the City of Baltimore, and it is his duty to receive and record all deeds, mortgages, conveyances, and other papers entitled or required by law to be recorded in the land records of the City of Baltimore (R. 2).

On March 12, 1938, the respondent, through its agent and employee, at the office of the Clerk of the Superior Court of the City of Baltimore during the hours when that office was open for the transaction of business tendered to the petitioner, as Clerk of the Superior Court of Baltimore City, the mortgage executed and delivered to it by Martin J. Burns and Mary Burns (R. 5–8) duly executed and acknowledged, and in all respects ready and eligible for recording under the registration laws of the State of Maryland, together with a fee of $2.50, the lawful charge for recording the mortgage, and requested and demanded that the mortgage be received and recorded among the land records of the City of Baltimore as provided by law (R. 2–3).

The petitioner, as Clerk of the Superior Court of Baltimore City, upon tender of the mortgage for recordation and the usual fee exacted for recording, refused to receive the mortgage for recordation, and refused to record the mortgage unless and until the respondent paid to him for the use of the State of Maryland, in addition to the usual fee for recording, a recording tax of fifty cents, and also unless and until State of Maryland documentary stamps amounting to twenty cents in cost were purchased, affixed to the mortgage, and cancelled (R. 3).

Whereupon the respondent petitioned the Baltimore City Court for a writ of mandamus to compel the petitioner, as Clerk of the Superior Court of Baltimore City, to record the mortgage in issue upon payment of the lawful and usual fee for such service, alleging in the petition (R. 3–4) that it was immune from the Maryland stamp and recording taxes demanded by the petitioner (1) by virtue of the provisions of Section 4 (c) of the Home Owners' Loan Act of 1933, as amended, and (2) as an instrumentality of the United States of America engaged in the functions of the Federal Government, state taxation of which is precluded by constitutional limitation.

The petitioner's demurrer having been overruled with leave to answer, which the petitioner elected not to do, the Baltimore City Court granted the writ of mandamus petitioned for (R. 17–18). The Court of Appeals of Maryland affirmed (R. 18, 23).

SUMMARY OF ARGUMENT

I

A. The Maryland statute taxes mortgages when offered for record. It is immaterial whether it be viewed as a property or excise tax, for the tax immunity or liability of the H. O. L. C. would seem to be the same in any event.

B. Petitioner does not challenge the constitutionality of the Home Owners' Loan Act of 1933, as amended. It follows that the H. O. L. C. shares the full immunity from state taxation which attaches to the operations of the United States. Its functions are necessarily "governmental", since they are in exercise of the delegated powers of the Federal Government. Since it is wholly owned and controlled by the Government, its corporate organization does not affect the governmental nature of its activities. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477.

C. Congress has full power to determine whether the recordation of H. O. L. C. mortgages should be exempt from or to subject to state taxation, and the question of tax immunity or liability is simply one of Congressional intent. *Helvering* v. *Gerhardt*, 304 U. S. 405, 411–412. Such was the decision in *Federal Land Bank* v. *Crosland*, 261 U. S. 374, where the Court held invalid an Alabama mortgage recordation tax because in conflict with the Congressional exemption of federal farm loan mortgages. That decision is plainly correct.

The laws of the United States are declared by the Constitution to be "the supreme law of the land." If Congress had expressly declared that the recordation of H. O. L. C. mortgages should be exempt from state taxation the Maryland tax would fall, since the provision could not be declared to have no reasonable relationship to the ends promoted by the H. O. L. C.

The doctrine of immunity of federal instrumentalities from state taxation was developed simply as an attribute of the supremacy clause of the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 316, 426, 427, 433. Not until *Collector* v. *Day*, 11 Wall. 113, did the Court ascribe immunity to the more nebulous implications of a federated constitution. But even after that decision, and notably in recent Terms, the Court has continued to recognize the historic and specific basis for federal tax immunity. Thus, Congress has an undoubted power to waive the immunity from state taxation which would otherwise attach. In other cases, the Court has recognized the power of Congress to create an immunity for private persons who dealt with the Government and have held the taxpayer liable because Congress had provided no such immunity; correlatively, the Court has extended immunity to such private persons because Congress had declared that they should not be subject to state taxation. With these broad powers as to the tax immunity even of private persons, simply because

they deal with the United States, it follows *a fortiori* that Congress has full power to provide either tax immunity or liability for the property and operations of the Government itself.

The ultimate incidence of a tax cannot ordinarily be determined, with categorical exactness. In the case of the Maryland tax here involved, it is wholly impossible to determine on *a priori* grounds whether the economic burden will ultimately rest upon the H. O. L. C. or upon its borrowers. Even if the tax could precisely be allocated, it is impossible to measure the extent to which the tax upon either the H. O. L. C. or its borrowers is an interference with the governmental functions of the H. O. L. C. in providing credit relief for distressed home owners. The decision of these questions, impossible of exact answer, is committed to Congress and to Congress alone.

The Constitution, in giving to Congress this power, has not placed the states in jeopardy. From the beginning it has been recognized that Congress, by its very nature, represented the interests of the states as well as those of the National Government. *McCulloch* v. *Maryland, supra,* 435–436; *Helvering* v. *Gerhardt,* 304 U. S. 405, 412–413, 416. And in practice, Congress has many times waived an immunity which otherwise would attach to federal instrumentalities; indeed, in the last three Congresses some thirty-two statutes contain such a waiver.

II

The question, therefore, is simply one of Congressional intention.

A. It is necessary to draw a sharp distinction between the tax immunity of private persons and that inhering in the Government itself. We urge that no private person should be exempt from nondiscriminatory taxation simply because he deals with the Government, but that the Government itself should not in the absence of a clear consent be forced to account to the tax collector of a state.

This immunity of the Government is not, we think, adequately explained on the premise that "the power to tax involves the power to destroy." But there are powerful reasons, going beyond the economic burden of the tax, why the Government itself should not be forced into the position of a taxpayer. It would be anomalous for the operations of the United States, buttressed by the supremacy clause, to be subject to a compulsory exaction by an independent sovereign. Practical considerations reinforce the teaching of political science. The delay and accounting burdens, the necessity of opening the Government's books to numerous tax officials, and the burden of numerous and protracted suits, would combine to impose a staggering obstacle to the efficient conduct of the nation's business, which reaches into every taxing jurisdiction in the United States.

It is, we believe, because of these considerations that so marked a contrast appears in the decisions of this Court which deal on the one hand, with the tax immunity of private persons and, on the other hand, with that of the Government itself. The almost bewildering diversity of decision and reasoning in the former category has resulted, we believe, in there being no single decision extending immunity to a private person from a nondiscriminatory tax which can with confidence be said to be good law today. In sharp contrast, every decision of this Court that we have found holds, without a single dissenting vote, that the National Government cannot be subjected to state or local taxation. Each of the decisions, with one exception, has arisen in the silence of Congress. Because of the strong reasons for such an immunity, and because of the unbroken consistency of the decisions of this Court, Congress can be taken to have intended a different rule only when the waiver of immunity is clear. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, dealt with a wholly different situation, the immunity of a private person from taxation simply because he chanced to deal with the Government.

B. Section 4 (c) of the Home Owners' Loan Act of 1933 contains nothing to destroy this normal implication of immunity; on the contrary its language points with compelling force to a Congressional desire for immunity. The statute offers a broad exemption of "the Corporation." This is evi-

dently intended to exempt the H. O. L. C. from all taxes collected from it as a taxpayer. The enumeration of what is *included* in this exemption cannot be thought to mark its limit. The specific exception of real property would be unnecessary unless it were thought otherwise to be exempt. Since a "duly recorded home mortgage" is a statutory essential of the H. O. L. C. operations, it may, in addition, be said that in a very real sense their taxation is a taxation of the H. O. L. C. franchise. Further, the specific enumeration of H. O. L. C. loans, as included in the exemption of "the Corporation," must be supposed to include the mortgage security and recordation required of every loan.

The fragmentary legislative history points to a similar conclusion. Congress in providing immunity for national bank stock held by the R. F. C., after the decision of this Court in *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209, was completely explicit as to the Congressional understanding of the scope of the substantially identical exemption intended by the R. F. C. Act, and stated that it was the intention of Congress "to assert the broadest possible immunity from the burden of taxation for the Corporation, its assets, and its operations."

The omission of a specific exemption for mortgages, found in the Federal Farm Loan Act and

relied upon in *Federal Land Bank* v. *Crosland*, 261 U. S. 374, indicates no desire to waive their immunity. The tax exemption of the farm loan mortgages was extended to those held by joint stock land banks, which are not government instrumentalities, and also to those mortgages rediscounted with other private institutions. A specific exemption was, therefore, necessary; the H. O. L. C. mortgages, on the other hand, are held only by the Government itself.

A number of statutes have followed the same general model in providing tax exemption and, in the case of real estate, tax liability. They vary in minor details each from the other; the provisions have only rarely been discussed or considered by Congress. We think it fair to say that every exemption clause, whatever its precise phrasing, was intended to serve merely as an unnecessary notice that the customary tax exemption of the Government would attach.

ARGUMENT

I

THE IMMUNITY OR LIABILITY OF THE H. O. L. C. TO THIS TAX IS A QUESTION OF CONGRESSIONAL INTENT

A. *Nature of the Maryland Tax*

Section 6 of Chapter 277 of the Maryland Acts of 1939 (Appendix, *infra*, pp. 66–67), amends Sections

213 and 214 of Article 81 of the Annotated Code to read, in part:[1]

> 213. A tax is hereby imposed upon every instrument of writing conveying title to real or personal property, or creating liens or incumbrances upon real or personal property, offered for record and recorded * * *. The term "instruments of writing" shall include * * * mortgages * * *.
>
> In the case of instruments conveying title to property, the tax shall be at the rate of 10c for each $100 of the actual consideration paid or to be paid; in the case of instruments securing a debt, the tax shall be at the rate of 10c for each $100 of the principal amount of the debt secured. In addition to the tax imposed, the Clerks shall collect a charge of 50c for each instrument offered for record and recorded, upon which a tax is payable hereunder.
>
> * * * * *
>
> 214. No instrument subject to the tax imposed by this sub-title shall be received for record by any Clerk of the Court unless and until a stamp is affixed to said instrument and canceled. * * *

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[1] The case arose and was decided in the state courts under Section 4 of Chapter 11 of the Laws of the Maryland Special Session of 1937, *infra*, which added Sections 213 and 214 to the Code. The tax imposed by the 1937 Act was to expire on September 30, 1939. So far as relevant to this proceeding, there is no material difference between the 1937 and 1939 taxes. Section 25 of the 1939 law provides that its provisions "so far as they are substantially the same as existing statutes, shall be construed as continuations thereof".

> It shall be unlawful for any person to record any instrument subject to the tax imposed by this subtitle, or to incur any additional debt secured by an instrument previously recorded, with respect to which additional debt a tax is required to be paid, without having provided for the payment of the tax and recordation charge * * *.

The language of the statute[2] shows that it is imposed *on* the mortgage, *when* it is offered for record. This Court, in *Federal Land Bank* v. *Crosland*, 261 U. S. 374, 378, construed a substantially similar Alabama statute[3] as "a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it." It is immaterial whether this be the correct view, or whether a more refined analysis would describe the tax as a combined property tax and excise.[4] For the tax immunity or liability of the H. O. L. C. would reach indifferently, so far as we can see, to its property or to its lending operations.

The Maryland tax raises one other issue of terminology. Petitioner suggests that tax is not im-

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[2] The statute appears not to have been construed by the Maryland courts, or considered in any case other than the present.

[3] "No mortgage * * * which is given to secure the payment of any debt * * * shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record * * *." Alabama Acts of 1929, No. 328, p. 420.

[4] Compare *Pocohontas Collieries Co.* v. *Commonwealth*, 113 Va. 108, 112, describing a similar tax as a privilege tax.

posed on the H. O. L. C. but on private persons. This suggestion is based in part on the erroneous ground (Br. 34–36, 44) that the borrower rather than the H. O. L. C. meets the burden of the tax; this analysis is shown to be faulty at a later point (*infra*, pp. 17–26). The suggestion is also based in part on the opinion of the Attorney General of Maryland (Pet. Br. 67) that it is immaterial under the Act who supplies the funds for payment of the tax (Br. 6, 22–23). This feature, however, is not a peculiarity of the present statute; we know of no tax collector who has ever refused payment of a tax because tendered by one who might not be the taxpayer. More significantly, even though the mortgagee is not specifically named as the taxpayer, the recordation is solely for the protection of the H. O. L. C. and "whoever pays it it is a tax upon the mortgage." *Federal Land Bank* v. *Crosland*, 261 U. S. 374, 378. The Home Owners' Loan Act of 1933 requires that each loan be secured "by a duly recorded home mortgage" (*infra*, p. 53), and under the mechanics of the H. O. L. C. loan transaction it is forced to pay the recordation expenses in the first instance (*infra*, pp. 27–29). The tax must, therefore, be taken to be one which is applied to the H. O. L. C.

B. *The H. O. L. C. Has the Immunity of the United States*

Petitioner does not challenge the constitutionality of the Home Owners' Loan Act of 1933, as amended (Br. 12). The Court will, therefore,

"assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the federal government." *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *cf. Kay* v. *United States*, 303 U. S. 1.

It follows that the H. O. L. C. shares the full immunity from state taxation which attaches to the operations of the United States. It is settled that the activities of the United States can never be characterized as "proprietary" rather than "governmental." The Federal Government exercises only delegated powers, so "its every action within its constitutional power is governmental action." *Graves* v. *New York ex rel. O'Keefe, supra*, p. 477. This, too, petitioner concedes and relies on the nature of the H. O. L. C. activities only to demonstrate the supposed threat to state revenues (Br. 36–43).

It is also immaterial that the H. O. L. C. was created as a corporation rather than as a branch of one of the regular departments. The National Government itself is acting through a corporation which it owns and controls. "This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account." *Clallam County* v. *United States*, 263 U. S. 341, 345. Therefore its "activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments." *Graves* v. *New York ex rel. O'Keefe, supra*, p. 477.

C. *Congress Has Full Power to Exempt From or to Subject to State Taxation the Recordation of H. O. L. C. Mortgages*

The H. O. L. C. tendered the petitioner the mortgage recordation fee of $2.50 when it offered the mortgage for recordation; it refused to pay the additional excise tax of 50 cents on the mortgage offered for recordation or to purchase documentary excise stamps in the amount of 20 cents. These taxes, imposed at the time under Section 4 of c. 11 of the Laws of the 1937 Special Session, *infra*, and now under Section 6 of c. 277 of the Acts of 1939, *infra*, are conceded by petitioner to be revenue taxes and not service charges for recording (Pet. 5; Br. 10–12). This case, therefore, presents no issue as to any immunity which the Federal Government might have with respect to compensatory fees for the use of facilities supplied by the state, nor does it raise any question as to a charge which, nominally a compensatory fee, in fact provides revenues in excess of the cost of the service. The issue is simply the power of the state to tax a mortgage owned and offered for record by the Federal Government.

There is, we think, no doubt as to the power of Congress to resolve this issue by enacting either that the recordation of H. O. L. C. mortgages should be subject to or should be free of state and local taxation. The question thus is simply one of Congressional intent. *Helvering* v. *Gerhardt*, 304 U. S. 405, 411–412n. We shall first show that this

conclusion is compelled both by authority and by principle. Since there will be little question of the power of Congress to waive immunity, the discussion will be directed chiefly to the power of Congress to assert the immunity. Point II of this brief will discuss the question of whether Congress in fact intended such an exemption.

1. *The Court Has Settled the Question.*—The Court considered an Alabama statute which, in addition to the recording fee, imposed a tax upon the privilege of recordation in *Federal Land Bank v. Crosland,* 261 U. S. 374. It held the tax invalid as applied to a mortgage offered for record by a Federal Land Bank, because the Federal Farm Loan Act (Sec. 26, c. 245, 39 Stat. 360) declared that mortgages executed to Federal Land Banks should be tax exempt. Mr. Justice Holmes, writing for a unanimous Court, said (p. 378) that the state—

> has levied a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it. In doing so, by the construction given to the statute by the Supreme Court, it has included mortgages that if is not at liberty to reach.

We do not urge that the *Crosland* case settles all of the issues in this case, but it seems plain enough that it settles the *power* of Congress to exempt the recordation of H. O. L. C. mortgages.[5] The au-

[5] Petitioner's concession (Pet. 12; Br. 16) is even broader, and concedes that if the *Crosland* case is binding the deci-

thority of the *Crosland* case, in striking contrast to the decisions which have extended immunity from a nondiscriminatory tax to private persons, has been impaired by no other decision of this Court. In no case has it been held or suggested that the United States in the absence of consent is liable to taxation by the states.

Our case, however, does not rest upon authority alone. The nature of our federated system, the clear implication of most of the decisions of this Court and the practical reasons for tax exemption unite to show that Congress has full power to provide or to waive tax immunity for the operations of the United States.

2. *The Constitutional Basis.*—Article VI of the Constitution provides that "the laws of the United States" made in pursuance of the Constitution "shall be the supreme law of the land." If, then, Congress had expressly declared that the H. O. L. C. mortgages should be free of state taxation, the Maryland tax would fall unless it could be shown that the federal statute was unconstitutional. Such a statutory exemption could be declared invalid only on the ground that it had no relation to the governmental purposes of the H. O. L. C.,[6] and so was neither a necessary nor a

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sion below is correct. The Government's brief in opposition (pp. 6, 12) seems also to have taken an unduly broad view of the *Crosland* holding.

[6] As set out at length in the brief for the respondent in *Kay v. United States*, No. 61, October Term, 1937, pp.

proper means toward the ends promoted by the H. O. L. C.[7] But, so long as there is a reasonable relationship between the legislation and the end which it is designed to promote, the courts have no power to reexamine the Congressional decision that the statute is necessary and proper. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Logan* v. *United States*, 144 U. S. 263, 283; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 473–474. It is difficult to believe that a provision for tax exemption of the mortgages and operations of the H. O. L. C. could be held to have no reasonable relation to the Congressional purpose of providing relief for distressed home owners.

Petitioner urges that the gain to the Federal Government, or the aid to the purposes served by the H. O. L. C., is less vital to the national well-

64–102, the H. O. L. C. activities are an exercise of the fiscal and general welfare powers granted to Congress.

[7] It might possibly be urged that the exemption was unconstitutional under the Tenth Amendment, as an invasion of the reserved powers of the states. The Government, at each of the last two Terms, has offered an extended analysis of that Amendment in opposition to contentions of invalidity based on the reserved powers of the states. *United States* v. *Bekins*, No. 757, October Term, 1937 (Br. 48–66); *Mulford* v. *Smith*, No. 505, October Term, 1938 (Br. 120–138). While the Court did not in either case undertake to resolve the issue, it seems unnecessary again to repeat the argument that the Tenth Amendment cannot restrict the scope of federal powers. For we know of no instance in which it has even been argued that federal tax immunity violates the Tenth Amendment.

being than are the meritorious uses of the revenues from the state tax (Br. 12, 42). But such an inquiry would be academic, for under the Constitution the choice of conflicting ends is for Congress, not the Maryland legislature. It was urged in the Social Security cases that the expenditures were likely to be contrary to state policy. The Court, in *Helvering* v. *Davis*, 301 U. S. 619, 645, replied:

> The issue is a closed one. It was fought out long ago. When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield. Constitution, Art. VI, Par. 2.

3. *The Decisions of this Court.*—The doctrine of intergovernmental tax immunity has its historic basis in the supremacy clause of the Constitution; throughout the winding course of tax immunity litigation, Article VI of the Constitution has measurably shaped the results of a number of cases; and in recent terms the Court has once more recognized the force of the supremacy clause in this field. To the extent that immunity from state taxation is a product of federal supremacy, there is no room for argument as to the power of Congress to provide exemption.

The state taxes in the early cases fell, not before an express Congressional provision of immunity, but before an implied conflict with the federal stat-

utes authorizing the taxed activity. The Court in *McCulloch* v. *Maryland, supra,* placed its decision squarely on the "great principle" that "the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them" (p. 426). The opinion never deviates from the simple proposition that the states cannot tax federal instrumentalities because the Constitution declares the federal law, under which the instrumentality is created, to be supreme over the laws of the states. Thus, Chief Justice Marshall said (pp. 427, 433):

> It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.
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> The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the succeeding fifty years the Court seven times held a state tax invalid as applied to transactions of or affecting the United States; each decision was squarely placed on the ground of the con-

stitutional supremacy of the Federal Government.[8]

In *Collector* v. *Day*, 11 Wall. 113, these cases were wrenched into a pattern which was intended to protect state activities equally with those of the National Government.[9] But even after the decision in *Collector* v. *Day* the Court did not wholly lose sight of the traditional basis of tax immunity, or consistently ignore the specific constitutional basis for immunity found in Article VI in favor of a nebulous concept based only upon the implications latent in a federated system. Numerous cases have recognized that the doctrine of immunity is

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[8] *Osborn* v. *United States Bank*, 9 Wheat. 738, 868; *Weston* v. *City Council of Charleston*, 2 Pet. 449, 466–468; *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, 447–450; *Bank of Commerce* v. *New York City*, 2 Black 620, 632–634; *Bank Tax Case*, 2 Wall. 200; *The Banks* v. *The Mayor*, 7 Wall. 16, 25; *Bank* v. *Supervisors*, 7 Wall. 26.

Story entertained no doubt but that Congress could tax state instrumentalities although the states could not tax federal instrumentalities. Story, *Constitution*, I, Sec. 1053.

[9] None would quarrel with the decision so far as it expresses the principle that the doctrine of tax immunity ensures "the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system" (*Helvering* v. *Powers*, 293 U. S. 214, 225). But this by no means is the equivalent of saying that a particular type of tax must necessarily and automatically be given the same treatment without consideration of whether it be imposed by the federal or by a state government. This distinction is developed in more detail in our brief (pp. 26–36) as *amicus curiae* in *Graves* v. *New York ex rel. O'Keefe*, No. 478, October Term, 1938.

grounded at least in part on the supremacy clause.[19] And, in recent decisions, the Court has again explicitly recognized that one, if not the chief, basis for federal tax immunity is the supremacy clause of the Constitution. Thus, a footnote to the opinion in *Helvering* v. *Gerhardt*, 304 U. S. 405, 411, expanding the inferences of the text (pp. 411, 412) reads:

> Since the acts of Congress within its constitutional power are supreme, the validity of state taxation of federal instrumentalities must depend (a) on the power of Congress to create the instrumentality and (b) its intent to protect it from state taxation.

And in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 478, the Court repeated this thought—

> the federal government is one of delegated powers in the exercise of which Congress is supreme; * * *. And since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation.

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[19] *Missouri* v. *Gehner*, 281 U. S. 313, 321; *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 221; *Long* v. *Rockwood*, 277 U. S. 142, 147; *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 613; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103, 117; *Farmers Bank* v. *Minnesota*, 232 U. S. 516, 521; *South Carolina* v. *United States*, 199 U. S. 437, 451–452; *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 41.

The decisions amply bear out the inference to be drawn from these statements of principle, and show that the immunity of federal instrumentalities and transactions from state taxation turns upon the action of Congress, or the implications to be drawn from its silence.[11]

Thus Congress has an undoubted power to waive the immunity from state taxation which would otherwise attach to federal instrumentalities and transactions. *Van Allen* v. *The Assessors,* 3 Wall. 573, 583, 585; *People* v. *Weaver,* 100 U. S. 539, 543; *Mercantile Bank* v. *New York,* 121 U. S. 138, 154; *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, 668; *Mid-Northern Oil Co.* v. *Montana,* 268 U. S. 45; *Oklahoma* v. *Barnsdall Corp.,* 296 U. S. 521, 525–526; *Baltimore National Bank* v. *State Tax Commission,* 297 U. S. 209; *British-American Co.* v. *Board,* 299 U. S. 159.

Still other cases have expressly recognized the power of Congress to create a tax immunity for persons who dealt with the Government and have held the taxpayer liable because Congress had provided no immunity. *James* v. *Dravo Contracting Co.,*

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[11] The Court in *Graves* v. *New York ex rel. O'Keefe, supra,* 478–479, it is true, said:

"Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which courts have implied, is a question which need not now be determined."

This caution seems to have been dictated more by the fact that the issue was not presented in that case than by the requirements of constitutional theory or the decided cases.

302 U. S. 134, 161; *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 23; *Trotter* v. *Tennessee*, 290 U. S. 354; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127, 129; *Shaw* v. *Oil Corporation*, 276 U. S. 575, 578–579; *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319, 323; *Goudy* v. *Meath*, 203 U. S. 146, 149–150; *Central Pacific Railroad* v. *California*, 162 U. S. 91, 121, 125; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 589, 592.

Again, in other cases the Court has extended immunity from state taxation only, or in part, because Congress had so provided. *Lawrence* v. *Shaw*, 300 U. S. 245; *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 212–213; *Bank* v. *Supervisors*, 7 Wall. 26, 30–31; see Justices Brandeis and Stone, concurring in *Miller* v. *Milwaukee*, 272 U. S. 713, 716.

In none of these decisions which recognize that immunity from state taxation is a matter of Congressional intention was the taxpayer the Government itself. In each case the taxpayer was a private person who dealt with the United States, or was "a corporation having its own purposes as well as those of the United States and interested in profit on its own account" (*Clallam County* v. *United States*, 263 U. S. 341, 345). The power of Congress to create an immunity for these private taxpayers applies *a fortiori*, and in greatly intensified form, when the immunity is created for the H. O. L. C., a part of the Government itself.

4. *The Practical Necessities of Government.*—The effect of a tax upon the operations of government cannot ordinarily be determined with categorical exactness. This Court, dealing with taxes upon private persons, has frequently recognized the difficulty of gauging the economic incidence of those taxes upon the government with which the taxpayer deals. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 484–485; *Helvering* v. *Gerhardt*, 304 U. S. 405, 420–421; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 159–160. By the same token, the economic effects and practical interference of a tax laid upon the Government itself cannot be measured by *a priori* standards.

This is well illustrated by the case at bar. The Maryland tax is upon mortgages and deeds offered for record. Its economic burden appears likely to come to rest, either upon the H. O. L. C. or the borrower, according to a number of variable factors.[12] (1) In the case of a first mortgage offered for record by the H. O. L. C., the tax will be paid in the first instance by the H. O. L. C.[13] and the amount of the tax added to the indebtedness of the

[12] The information and speculation in this paragraph is drawn from letters to the Acting Solicitor General from Harold Lee, Esq., General Counsel of the H. O. L. C., dated August 8, 1939, and August 23, 1939.

[13] Its General Counsel states that the H. O. L. C. has made efforts to have the other party to the transaction pay the tax but that this is ordinarily accomplished only when the instrument is a deed from the H. O. L. C. to a purchaser.

mortgagor; (a) if the loan is repaid, the ultimate burden of the tax will rest on the borrower, while (b) if there is default, the H. O. L. C. will not be reimbursed for the amount of the tax, unless (c) the property acquired under the mortgage is sold for an amount sufficient to cover the debt, expenses, and the tax. (2) In the case of deeds in foreclosure proceedings or from mortgagors in lieu of foreclosure, the H. O. L. C. will pay the tax in the first instance and will recoup this expense only if the property is subsequently sold for a sufficient amount. (3) In the case of deeds of property from the H. O. L. C. to purchasers, the tax, in Maryland, will be paid equally by the purchaser and the H. O. L. C.[16] If the purchaser calculates with sufficient precision, it is possible that his offer to the H. O. L. C. will be correspondingly reduced.

Petitioner, it may be noted, does not agree with this analysis, and states that the amount of the tax is in practice paid by the borrower (Br. 34–36, 44). We agree that, as a general rule, the private mortgagee will require the borrower to pay the recordation expenses or will deduct their amount from the loan. But the H. O. L. C. loans are rehabilitation loans, not loans made for profit. There is no occasion to put pressure on the borrower to force him to pay all the costs of the transaction. Indeed, the mechanics of the transaction preclude payment by the borrower. The H. O. L. C. does not advance

[16] This is in response to a local custom in real-estate transactions.

cash to its borrowers; the amount of the mortgage loans, when the H. O. L. C. was making them, was paid directly to the old mortgagees, ordinarily in H. O. L. C. bonds (except for balances under $25), and the amount of the reconditioning loans is paid directly to the contractors. Thus, the borrower never receives cash and, we are assured by the H. O. L. C., does not pay recordation expenses. In any event, the allegations of the petition for writ of mandamus, admitted by the present petitioner's demurrer, are clear that the tax was demanded of the H. O. L. C. itself (R. 3). The tax, therefore, is paid in the first instance by the H. O. L. C. and its recoupment is postponed until the loan is repaid or otherwise closed without loss.

It is thus nearly impossible to estimate even the immediate incidence of the tax. It would be necessary to chart both the probability of repayment by Maryland borrowers from the H. O. L. C. and the future course of real estate values in the state. If the analysis were to be more refined, it would be necessary to venture still further into the realm of economic speculation, and to consider the effect of the tax on the value of Maryland real estate and economic activity generally.

Again, even if it be supposed that a precise allocation of the incidence of the tax were somehow accomplished, the degree of interference with the operations of the H. O. L. C. would remain wholly incapable of precise estimate. The Home Owners' Loan Act of 1933 was designed to offer emergency

relief for urban home owners who, because of a calamitous economic crisis, stood in danger of losing their homes. By permitting refinancing on easier terms for over a million borrowers,[15] the H. O. L. C. made a tremendous contribution to the general welfare of the United States.[16] If, for example, it were estimated that the H. O. L. C. would bear 25 percent of the ultimate tax burden and the borrowers 75 percent, it would still be impossible to estimate the degree of interference with the operations of the H. O. L. C. The very purpose of the Act was to provide relief for home mortgagors. None can say the extent to which imposing an added tax burden on the transaction through which relief was offered would be an interference with the federal purpose.[17] Certainly it is arguable that the interference would be fully as great as in the cases where the economic burden was supposed to fall entirely on the H. O. L. C. itself.

It would, we believe, be impossible to gather a faculty of economists who could provide wholly

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[15] *Final Summary of Financing Operations*, H. O. L. C., Dec. 4, 1936.

[16] See *First Federal Savings & Loan Association* v. *Loomis*, 97 F. (2d) 831, 839, 840 (C. C. A. 7th), certiorari dismissed, on motion of petitioners, *Martin* v. *First Federal Savings & Loan Association*, 305 U. S. 666.

[17] Senator Hollis, in charge of the comparable Federal Farm Loan bill, said that the purpose of the exemption for mortgages executed to the federal and joint stock land banks was to aid the borrowing farmer. 53 Cong. Record, Part 7, p. 6851.

satisfactory answers to these questions. However that may be, under the Constitution, Congress, and Congress alone, has the power finally to make the choice. If Congress had undertaken expressly to provide either a rule of immunity or of taxability for the H. O. L. C. recordation transaction, it is unthinkable that this Court should say, in a field so beset by doubt and speculation, that the decision of Congress was arbitrary, or had no reasonable relation to the purpose sought to be accomplished.

It is to be noted that this is the converse of the problem presented with respect to the conjectural incidence of taxes imposed in the first instance on private persons. In each case the ultimate burden of the tax "depends upon considerations so various and complex as to preclude the assumption *a priori* that any particular tax at any particular time is passed on." Justices Stone and Brandeis, dissenting in *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 581. For that reason we urge that it requires an express declaration by Congress either to exempt a private person from taxation or to waive the immunity of the Government itself.

In committing the decision of these questions to Congress, the Constitution has not, as petitioner fears, placed the revenues of the states in jeopardy (Br. 11–12, 37, 41). From the beginning it has been recognized that Congress, by its very nature, could be trusted to represent the interest not only of the National Government but of the states as well.

Chief Justice Marshall, in *McCulloch* v. *Maryland*, *supra*, pp. 435–436, said:

> The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control.

The Court in *Helvering* v. *Gerhardt*, 304 U. S. 405, quoted this extract from *McCulloch* v. *Maryland*, and, in the light of 120 years of constitutional history, reaffirmed and amplified the reasoning of Chief Justice Marshall.[18] It said (p. 416)—

> the people of all the states have created the national government and are represented in Congress. Through that representation they exercise the national taxing power. The

[18] In a sense the discussion was dictum, for the Court said (p. 415):

"We need not stop to inquire how far, as indicated in *McCulloch* v. *Maryland*, *supra*, the immunity of federal instrumentalities from state taxation rests on a different basis from that of state instrumentalities; or whether or to what degree it is more extensive. As to those questions, other considerations may be controlling which are not pertinent here. * * *"

> very fact that when they are exercising it they are taxing themselves, serves to guard against its abuse through the possibility of resort to the usual processes of political action which provides a readier and more adaptable means than any which courts can afford, for securing accommodation of the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other.

At another point the Court again developed this thought.[19] And in *Graves* v. *New York ex rel. O'Keefe, supra*, p. 478, the Court referred to this discussion in the *Gerhardt* case with at least guarded approval.

The practical truth of this principle has abundantly been demonstrated in the history of our federation. We know of no instance in which a state has ever waived its own immunity, or that of its instrumentality, from federal taxation. But, as

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[19] * * * Chief Justice Marshall, * * * was careful to point out not only that the taxing power of the national government is supreme, by reason of the constitutional grant, but that in laying a federal tax on state instrumentalities the people of the states, acting through their representatives, are laying a tax on their own institutions and consequently are subject to political restraints which can be counted on to prevent abuse. State taxation of national instrumentalities is subject to no such restraint, for the people outside the state have no representatives who participate in the legislation: and in a real sense, as to them, the taxation is without representation. The exercise of the national taxing power is thus subject to a safeguard which does not operate when a state undertakes to tax a national instrumentality (304 U. S. at 412).

this Court has noted, the Congress has many times waived an immunity which otherwise, under existing decisions, would have attached to federal instrumentalities. *Helvering* v. *Gerhardt, supra,* p. 417; *Graves* v. *New York ex rel. O'Keefe, supra,* p. 478. Compare *Howard* v. *Gipsy Oil Co.,* 247 U. S. 503, and *Large Oil Co.* v. *Howard,* 248 U. S. 549, with *Oklahoma* v. *Barnsdall Corp.,* 296 U. S. 521, 522-523; *Gillespie* v. *Oklahoma,* 257 U. S. 501, with *British-American Co.* v. *Board,* 299 U. S. 159, 161, 166. More specifically to indicate the frequency with which Congress waives tax immunity, there are gathered in the margin thirty-two Acts by which the Congress, in the course of only three Congresses (the 73d to 75th), has waived the immunity of its instrumentalities in whole or in part.[20]

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[20] Real estate is frequently subjected to nondiscriminatory state taxation. Act of June 13, 1933, c. 64, 48 Stat. 130; Act of June 16, 1933, c. 89, 48 Stat. 177; Act of June 16, 1933, c. 98, 48 Stat. 267; Act of January 31, 1934, c. 7, 48 Stat. 347; Act of April 27, 1934, c. 168, 48 Stat. 644; Act of June 27, 1934, c. 847, 48 Stat. 1252, 1255, 1257; Act of August 23, 1935, c. 614, 49 Stat. 700; Act of July 22, 1937, c. 517, 50 Stat. 531; Act of December 6, 1937, c. 3, 51 Stat. 4; Act of February 3, 1938, c. 13, Sec. 4, 52 Stat. 22; Act of February 3, 1938, c. 13, Sec. 8, 52 Stat. 24; Act of March 8, 1938, c. 44, Sec. 5, 52 Stat. 108. Personal property likewise is frequently subjected to nondiscriminatory state taxation as are also shares of stock in government instrumentalities when owned by private individuals. Act of June 16, 1933, c. 98, 48 Stat. 267; Act of June 26, 1934, c. 750, 48 Stat. 1222; Act of July 22, 1937, c. 517, 50 Stat. 531; Act of December 6, 1937, c. 3, 51 Stat. 4. In numerous instances government instrumentali-

Petitioner challenges the view that Congress has power to widen the limits of federal tax exemption from those prescribed by the Constitution; this is on the ground that if the tax interferes with the federal function it is invalid under the Constitution and, if it does not, the provision for exemption is not a law which is necessary or proper to attain the governmental ends (Br. 48–50). The dilemma is logically flawless, but rests upon an entirely false premise. The incidence and interference of a tax are not facts which exist or do not, but are invariably questions of degree and of doubt. The legislative branch of the Government was created by the Constitution to resolve just such questions as these.

It seems clear, therefore, that the settled principles of constitutional doctrine, giving Congress full power to determine whether federal property

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ties are subjected to limited state taxation or to state taxation to the same extent as similar state institutions or instrumentalities. Act of June 13, 1933, c. 64, 48 Stat. 133; Act of June 18, 1934, c. 585, 48 Stat. 993; Act of June 26, 1934, c. 750, 48 Stat. 1222; Act of June 27, 1934, c. 847, 48 Stat. 1249, 1255; Act of March 12, 1936, c. 138, 49 Stat. 1160; Act of April 17, 1937, c. 108, 50 Stat. 68; Act of August 25, 1937, c. 772, 50 Stat. 806. In still other instances the United States or its instrumentalities are authorized to pay certain amounts to the States or local taxing units in lieu of taxes. Act of May 18, 1933, c. 32, 48 Stat. 66, Act of April 13, 1934, c. 116, 48 Stat. 577; Act of June 29, 1936, c. 860, 49 Stat. 2026; Act of June 29, 1936, c. 868, 49 Stat. 2036; Act of May 28, 1937, c. 277, 50 Stat. 221; Act of July 22, 1937, c. 517, 50 Stat. 531; Act of August 9, 1937, c. 570, 50 Stat. 570; Act of August 28, 1937, c. 876, 50 Stat. 876; Act of September 1, 1937, c. 896, 50 Stat. 895.

and transactions should be exempt from or subject to state taxation, do not endanger the states but are in truth required by the practical necessities of a federated government. The question, both on authority and on reason, is simply whether Congress intended immunity or taxability.

II

CONGRESS INTENDED TO EXEMPT THE RECORDATION OF H. O. L. C. MORTGAGES FROM STATE TAXATION

Congress, then, has full power to exempt the recordation of H. O. L. C. mortgages from state taxation or to subject them to such taxation. It has, however, made no express provision as to the tax status of H. O. L. C. mortgage recordation. There arises, therefore, the further question as to the interpretation of the Home Owners' Loan Act of 1933: what in truth did Congress intend?

The two courts which have considered the question have each held the H. O. L. C. to be exempt from taxation on its mortgages offered for record. This was the decision in the instant case and in *Home Owners' Loan Corporation* v. *Anderson*, 145 Kan. 209. The two state attorneys general who have rendered formal opinions have similarly ruled, 1935–1936 Op. Pa. A. G. 55; Rhode Island (Apr. 23, 1936). See, also, *Federal Land Bank* v. *Hubard*, 163 Va. 860. These cases and rulings, we submit, have reflected the intention of Congress.

We shall show, first, that tax immunity would have been the necessary conclusion if Congress had been wholly silent as to H. O. L. C. tax exemption;

then we shall show that this normal implication is confirmed rather than contradicted by the provisions which in fact are found in Section 4 (c) of the Act.

A. *The Silence of Congress Implies an Immunity From State Taxation for the Operations of the United States*

1. *The Distinction Between Private Taxpayers and the Government.*—It is necessary at the outset to draw a sharp distinction between the tax immunity to be accorded private taxpayers who chance to deal with the Government and that inhering in the Government itself, including, of course, its instrumentalities which are a part of the governmental structure (*Clallam County* v. *United States*, 263 U. S. 341). We urge that no private person should be exempt from nondiscriminatory taxation merely because his transaction is with the government of a state or the nation.[21] But we think that the United States itself should not in the absence of a clear consent be forced to account to the tax collector of a state.

When this distinction is made clear, much of the differences between petitioner and the Government evaporate. With much, if not most, of petitioner's

[21] This generalization, as with most legal principles, is subject to qualification or exception. Taxes of a character not now known to us might present an actual interference with the operations of government; or Congress might choose to alter the normal inference to be drawn from its silence.

able and candid brief we are in complete agreement. Thus, we agree wholly that any nondiscriminatory tax should be valid (Br. 18–23); we urge only that the principle should, as are the cases on which petitioner relies, be limited to taxes laid on private persons. We agree, but subject to the same limitation, that no immunity should be granted from taxes the economic burden or governmental interference of which is conjectural (Br. 34–36). We agree that the recent decisions of this Court have served to make sweeping and wise modifications in the law of intergovernmental tax immunity (Br. 16, 29–33); we insist, however, that these decisions are confined to private taxpayers who deal with the Government.

The immunity of the Government itself from a nondiscriminatory tax is not, we think, adequately explained on the premise that "the power to tax involves the power to destroy."[22] Representative government has, throughout the history of the Nation, proved an adequate guarantee against oppressive taxation. Payment of a tax, which neither in terms nor in fact marks the Government transaction as the object of the levy, will not bring the op-

[22] See Justices Holmes, Brandeis, and Stone, dissenting in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 223; Justices Holmes, Brandeis, Sutherland, and Stone, dissenting in *Long* v. *Rockwood*, 277 U. S. 142, 150; Mr. Justice Frankfurter, concurring in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 489–490.

erations of the Government to a halt. For this reason the United States as *amicus curiae* urged in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, that a gross-receipts tax upon the federal contractor should be sustained, even though the full amount of the tax burden would ordinarily be passed on to the Federal Government.

But there are powerful reasons, going beyond the economic burden of the tax, why the Government itself should not be subject to state taxation unless it has plainly accepted that burden. These reasons are found both in political philosophy and in practical government. None is applicable to the case of the private taxpayer who deals with the government.

It is unnecessary to dwell on the anomalous philosophic nature of a tax imposed on an independent sovereign. A tax is a compulsory exaction by the sovereign from its subject.[23] Whatever the view one accepts of the nature of government, whether as the source of ultimate force or as the result of a social compact, it is plain that there is no philosophic basis for the power by unilateral action to wrest taxes from another sovereign government. It may be argued that the supremacy clause of the

[23] See *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 279; *United States* v. *LaFranca*, 282 U. S. 568, 572; *Houck* v. *Little River District*, 239 U. S. 254, 265; *Florida Central R. Co.* v. *Reynolds*, 183 U. S. 471, 475; *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190, 197–198.

Federal Constitution so bulwarks the federal taxing power that it reaches to the states themselves. But this argument would defeat rather than aid any contention that the states could tax the United States.

The principles of political science are reinforced by urgent practical considerations. If, to the manifold duties of each federal department and agency, there were added the burden of preparing numerous tax returns in each of 48 or more separate taxing jurisdictions, it is not difficult to see that the governmental functions would be appreciably impeded. Apart from the accounting burden, the local tax collectors might be content to accept the government's return or they might, on the other hand, be sufficiently conscientious or antagonistic to demand the production of the government's books. Even to permit an intelligent inspection by numerous state officials would produce a heavy and often repeated burden on the agency's staff. In the inevitable event of disputes as to the amount of liability, the Government would be faced with numerous and protracted suits. The usual delays and negotiations would be prolonged if local tax assessors abandoned any general leniency in assessment because of the vast resources of the Federal Treasury. Since its operations reach into every taxing jurisdiction in the United States, the Federal Government would be faced with a staggering obstacle to the efficient conduct of the nation's

business if it were thought subject to the jurisdiction of every state and local tax collector.[24]

2. *The Decisions of this Court.*—The rules of intergovernmental tax immunity, so far as they have been developed and applied to private persons who deal with the government, exhibit an almost bewildering diversity of decision and reasoning. A number of cases have expressly been overruled;[25] many more have been distinguished on the narrow-

[24] The only arguable exception which we know to an unbroken practice of exemption is found in the procedure followed in purchasing land in the name of the United States. Attorney General Garland, in 18 Op. A. G. 491 (1887), advised the Secretary of War to pay a recordation tax, in addition to the recordation fee, imposed by Virginia on deeds offered for record. The reasoning of the opinion, to the effect that recordation is a privilege offered by the State which the Government may accept or not as it chooses, is contradicted by the decision of this Court in *Federal Land Bank* v. *Crosland*, 261 U. S. 374. But, perhaps in consequence of this opinion, the practice has developed by which the United States makes payment for land purchased only after the vendor has himself placed the deed on record and satisfied all taxes. Under this practice, it will be observed, the taxpayer is not the Government but the private land owner.

[25] *Long* v. *Rockwood*, 277 U. S. 142, overruled by *Fox Film Corp.* v. *Doyal*, 286 U. S. 123; *Gillespie* v. *Oklahoma*, 257 U. S. 501, and *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, overruled by *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376; *Collector* v. *Day*, 11 Wall. 113; and *N. Y. ex rel. Rogers* v. *Graves*, 299 U. S. 401, overruled in *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466; compare *Evans* v. *Gore*, 253 U. S. 245 and *Miles* v. *Graham*, 268 U. S. 501, apparently overruled by *O'Malley* v. *Woodrough*, 307 U. S. 277.

est of grounds;[26] and in still other decisions technical rules have been devised to reach results in practical contradiction of earlier cases.[27] In short, there is no single decision exempting a private taxpayer from a nondiscriminatory tax which can with confidence be said to be good law today.

Measured against the fluctuating doctrines and the contrariety of results reached in the cases of taxes directed at private persons who deal with the government, the decisions relating to a tax on

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[26] Compare, e. g.: (1) *Brush* v. *Commissioner*, 300 U. S. 352, with *Helvering* v. *Gerhardt*, 304 U. S. 405; (2) *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, with *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466; (3) *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570; and *Graves* v. *Texas Co.*, 298 U. S. 393, with *Alward* v. *Johnson*, 282 U. S. 509; *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572; and *James* v. *Draco Contracting Co.*, 302 U. S. 134; (4) *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, with *Pacific Co.* v. *Johnson*, 285 U. S. 480.

[27] Compare, e. g.: (1) *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, with *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (and see Justices Brandeis, Holmes and Stone dissenting in *National Life Ins. Co.* v. *United States*, 277 U. S. 508, 527); (2) *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, with *Liggett & Myers Co.* v. *United States*, 299 U. S. 383; (3) *Telegraph Co.* v. *Texas*, 105 U. S. 460, and *Williams* v. *Talladega*, 226 U. S. 404, with *James* v. *Draco Contracting Co.*, 302 U. S. 134; (4) *Bank of Commerce* v. *New York City*, 2 Black 620, and *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, with *Society for Savings* v. *Coite*, 6 Wall. 594; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103; and *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506.

the United States itself show an extraordinary uniformity. No decision of this Court has ever held, in the absence of legislative consent, that the national government could be taxed by a state or local government. No Justice of this Court has dissented from this result in any case which we have found.[25]

Of these cases, only one, *Federal Land Bank* v. *Crosland*, 261 U. S. 374, arose under a statute which expressly declared the transaction exempt. Each of the other cases recognized that immunity must be the result in the silence of Congress. The opinions speak, generally, of a "constitutional" immunity from taxation. But in view of the undoubted power of Congress to waive the immunity of the United States or to declare an exemption which would not otherwise be granted (see *supra*, pp. 17–26), the immunity from state taxation seems much more properly to be viewed as an interpretation of the Act of Congress under which the transaction occurred.

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[25] Two cases were affirmed by an equally divided Court at the December Term, 1849. Their facts are reported in *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 175–177. One, *United States* v. *Portland*, resulted in the dismissal of a suit by the United States to recover taxes paid on a customs building; the other, *Roach* v. *Philadelphia County*, affirmed a decision that the United States was liable to local taxation on the U. S. Mint. These inexplicable decisions, as pointed out in the *Van Brocklin* case, have no weight as authority.

Since the Second Bank of the United States had a preponderantly private stock ownership,[29] it probably would be viewed at this day as a private corporation having its own purposes as well as those of the United States (*Clallam County* v. *United States*, 263 U. S. 341), rather than the Government itself. But the Court's approach then seems to have been to view the bank as a part of the Government. In any event, the Court in *McCulloch* v. *Maryland*, 4 Wheat. 316, and *Osborn* v. *United States Bank*, 9 Wheat. 738, held the bank to be immune from discriminatory taxation upon its transactions. In *United States* v. *Railroad Company*, 17 Wall. 322, the Court held invalid a federal tax on interest payments to the City of Baltimore.[30] *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, held land acquired by the United States from a tax defaulter to be exempt from state

[29] The Government, under its charter, was to subscribe to only twenty percent of the stock; its subscription was in fact approximately that proportion throughout the life of the bank. Holdsworth and Dewey, *The First and Second Banks of the United States*, Sen. Doc. No. 571, 61st Cong. 2d Sess.

[30] The tax might well have been construed as laid upon the railroad, but the Court held otherwise (pp. 325–327). It is not wholly clear whether the Court construed the Act to exempt the municipal income or held it invalid as there applied; Justice Bradley concurred on the ground that the Act intended to exempt such income (p. 333). Justices Clifford and Miller dissented on the ground that the city held the railroad bonds in a proprietary capacity.

taxation.[31] *Federal Land Bank* v. *Crosland*, 261 U. S. 374, turned on a statutory provision for immunity, but the decision exempting mortgage recordation from state taxation has since been cited by this Court as a decision based on the Constitution in the silence of Congress.[32] In *Clallam County* v. *United States*, *supra*, the land and physical property of a corporation wholly owned by the Government was held exempt from local taxation, although "no specific words forbid the tax." In *New Brunswick* v. *United States*, 276 U. S. 547, the equitable interest of a wholly owned Government corporation, in land sold with the reservation of a purchase money lien, was held exempt from local taxation; while the city could tax the interest of the mortgagors, the Court held that

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[31] A number of other cases have held, under varying circumstances, that land owned by the United States is exempt from state or local taxation. E. g.: public lands prior to patent or passage of equitable title to private persons: *McGoon* v. *Scales*, 9 Wall. 23; *Railway Company* v. *Prescott*, 16 Wall. 603; *Railway Company* v. *McShane*, 22 Wall. 444; *Tucker* v. *Ferguson*, 22 Wall. 527, 572; *Colorado Company* v. *Commissioners*, 95 U. S. 259; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504; *Irwin* v. *Wright*, 258 U. S. 219; *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643; *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89. Lands held in trust for Indians: *United States* v. *Rickert*, 188 U. S. 432.

[32] See *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 627; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 389; cf. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 150; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466.

any tax sale must be in subordination to the Government's lien.

In *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209, it is true, the Reconstruction Finance Corporation was held subject to state taxation on national bank shares held by it, but this was only because Section 5219 of the Revised Statutes, was construed to permit taxation of those shares by whomever held.[33]

It seems clear enough, therefore, that the Court has uniformly held the operations and the property of the Government itself to be immune from taxation, so long as there is no express waiver of that immunity by Congress. This consistency of decision, in so marked contrast to the cases dealing with private taxpayers, cannot be destroyed by reference either to the economic incidence of the tax burden or to the amenability of the H. O. L. C. to suit.

It may be that much of the economic burden of the tax will be passed on by the H. O. L. C. to its borrowers (see, *supra*, pp. 27–29). But, as has been shown above, when the taxpayer is the Government itself, it is immaterial to its immunity that the cost may ultimately be paid by another.

[33] Even with this inferential support for the tax liability, the Court seems to have underestimated the Congressional reluctance that the Government itself be taxed. The Act of March 20, 1938 (c. 160, 49 Stat. 1185, 12 U. S. C., Supp. IV, 31d), six weeks after the Court's opinion, extended the R. F. C. a retroactive as well as prospective immunity from such taxation. See *infra*, pp. 56–58.

The rule was expressed by Mr. Justice Holmes, in *Johnson* v. *Maryland*, 254 U. S. 51, 55–56, that there is an "entire absence of power on the part of the States to touch," by taxation "the instrumentalities of the United States." Since that case involved the attempt to require a license of a mail-truck driver, the somewhat elusive term "instrumentalities" must be read to refer to the operations of the Government. So understood, the rule is not a relic of an older jurisprudence but a principle which is still unimpaired, either in its vitality or in its authority.

Similarly, it is a matter of no consequence that, even in the silence of Congress, the corporate organization of the H. O. L. C. might have led to an inference that it was intended to be amenable to suit, if at least it had been sired by another corporation itself liable to suit. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381. For the "immunity of corporate government agencies from suit * * * is less readily implied than immunity from taxation." *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 235. And, so long as the constitutionality of the H. O. L. C. is not challenged, this Court has already decided that it has the full tax immunity of the United States. *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477.

3. *The Waiver of Immunity Must be Clear.*— The tax immunity of the property and the operations of the Government itself is, then, a rule which is reinforced by strong practical reasons and sanc-

tioned by an unbroken line of decisions of this Court. It is a rule of statutory, rather than of constitutional construction, but its consistency gives to the silence of Congress an eloquence and a force which will not often be found in rules based on legislative silence. Compare Bikle, *The Silence of Congress,* 41 Harv. Law Rev. 200; Powell, *The Still Small Voice of the Commerce Clause,* 3 Selected Essays on Constitutional Law 931.

One would expect, then, that the normal tax immunity which attaches to the property and operations of the United States would not be lost except by a waiver which was both express and unequivocal. Such is the rule. "The waiver must be clear, and every well-grounded doubt upon the subject should be resolved in favor of the exemption." *Austin* v. *The Aldermen,* 7 Wall. 694, 699. See *Farmers Bank* v. *Minnesota,* 232 U. S. 516, 528.

In *Graves* v. *N. Y. ex rel. O'Keefe, supra,* pp. 479–480, the Court found the silence of Congress no bar to the taxation of salaries paid government officers and employees, because "the Congressional intention is not to be gathered from the [H. O. L. C.] statute by implication" and because the doctrine of the silence of Congress has little application "to the tax immunity of governmental instrumentalities." Cf. *Helvering* v. *Gerhardt,* 304 U. S. 405, 412. This ruling, urged by the Government as *amicus curiae,* was made with respect to an

immunity claimed by a private person. As we have shown above, the immunity of the Government itself stands upon quite a different footing. Here there is a settled and wholly consistent line of decisions, reflecting the most urgent practical considerations, which demonstrate the normal expectation that the United States will not be required itself to pay taxes to the state governments. The Court truly said (p. 480), of the private taxpayer who claimed immunity from a nondiscriminatory tax, that since "there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity." Here there is every ground for implying a "constitutional" immunity of the H. O. L. C. itself, and added strength is lent to the common-sense supposition that the silence of Congress would be intended to continue rather than to destroy the rule which always theretofore had been supposed to apply in the absence of an express waiver of immunity.

B. *The H. O. L. C. Act Contains No Waiver of and Indeed Indicates a Congressional Desire for Immunity*

We have shown that Congress had full power to exempt the mortgages and the recordation transactions of the H. O. L. C. from state taxation. We have shown that, if Congress had remained wholly silent, there would have been an immunity from

state taxation. The only remaining question is whether the Home Owners' Loan Act of 1933, as amended, contains anything which may be construed as a consent to the imposition of the Maryland tax.

That tax, as we have shown (*supra*, p. 14) may be viewed either as a property tax on mortgages, as an excise upon the act of recording mortgages, or as a blend of both. Whatever interpretation be adopted, it seems reasonably clear that the federal statute contains nothing to waive the immunity which otherwise would attach to the H. O. L. C. mortgages and their recordation. Indeed, the implications both of the statute and of its legislative history point with compelling force to a Congressional desire for immunity.

1. *The Language of the Statute.*—Section 4 (c) of the Home Owners' Loan Act of 1933, *infra*, provides:

> The bonds issued by the Corporation * * * shall be exempt * * * from all taxation * * * imposed by * * * any State * * *. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed.

This provision not only fails as a waiver of immunity but affirmatively exempts the H. O. L. C. from the tax here sought to be imposed.

The statute offers a generalized tax exemption of "the Corporation." This broad exemption is quite evidently intended to exempt the H. O. L. C. from all taxes which would be collected from it as a taxpayer. The enumeration of its franchise, loans, etc., is not a provision for specific exemptions, leaving other assets or transactions taxable, but is merely offered as illustrative of what is *included* in the exemption of "the Corporation."

Any thought that the enumeration marks the limit of the exemption is dispelled by the specific exception of real property. Unless tax exemption for real property were thought included in the exemption of "the Corporation," there could have been no occasion for its exception. Since property other than real estate is equally included in the exemption of "the Corporation," a specific exception would be equally necessary for its taxation. Thus, when Congress intended that the tangible personal property of the production credit organizations and the banks for cooperatives should be subject to taxation, the exception of real estate in a similar exemption section was expanded to include tangible personal property. (Sec. 63, c. 98, 48 Stat. 267; 12 U. S. C. 1138c.)

The statute subjects the H. O. L. C. to only one form of taxation, a nondiscriminatory tax on real

property. A mortgage is not real estate,[24] and is therefore not covered by the specific and limited

[24] See *Timms* v. *Shannon*, 19 Md. 296, 314: "In Courts of Equity, a mortgage of lands is regarded as a mere security for money, a chattel interest or chose in action, the debt being considered as the principal, and the mortgage as the accessory or appurtenant thereto." See, also, *Mizen* v. *Thomas*, 156 Md. 313, 318–319; *Washington Fire Ins. Co.* v. *Kelly*, 32 Md. 421.

Sec. 21 of Art. 66 of the Maryland Code, *infra*, provides that a mortgage upon the death of the mortgagee shall devolve on and vest in the mortgagee's executor or administrator. Moreover, Sec. 213 of the Maryland Acts of 1939, *infra*, disjunctively differentiates instruments conveying title to real or personal property and those merely creating liens or incumbrances upon real or personal property.

Under the title theory, accepted to some extent by Maryland courts, the interests of the mortgagee are often considered an interest and estate in the mortgaged land; but that interest or estate "is treated by Courts of law as real estate only so far as it may be necessary for the protection of the mortgagee and to give him the full benefit of his security." *Allen* v. *Nat. State Bank*, 92 Md. 509, 516.

In the majority of the states, either by statutes or by decisions of the courts, the common-law doctrine of mortgages has given place to the equitable theory that a mortgage is nothing more than a mere lien or security for and incidental to a debt, vesting no title or estate in the mortgagee. *Johnson* v. *Razy*, 181 Cal. 342; *Moncrieff* v. *Hare*, 38 Colo. 221; *Evins* v. *Gainesville Nat'l Bank*, 80 Fla. 84; *Phillips* v. *Bond*, 132 Ga. 413; *Hannah* v. *Vensel*, 19 Ida. 796; *Sinclair* v. *Gunzenhauser*, 179 Ind. 78; *Sheakley* v. *Mechler*, 199 Iowa 1390; *Willoughby* v. *Watson*, 114 Kan. 82; *Smith* v. *Berry*, 167 Ky. 646; *Walsh* v. *Robinson*, 135 Mich. 16; *Stitt* v. *Rat Portage Lumber Co.*, 96 Minn. 27; *Morrison* v. *Farmer's & Trader's State Bank*, 70 Mont. 146; *Clark* v. *Missouri K. & T. Trust Co.*, 59 Neb. 53; *Southern Pac. Co.* v. *Miller*, 39 Nev. 169; *Eccles* v. *Will*, 23 N. M. 623; *Beardslee* v. *New Berlin Light Co.*, 207 N. Y. 34; *McClory* v. *Ricks*, 11 N. D. 38; *Moore* v.

exception to the general rule of immunity.[35] The exception was plainly designed simply to prevent the withdrawal from the normal *ad valorem* tax rolls of real estate owned by the H. O. L. C.

Finally, even if it were thought that provision for tax exemption must be found in the specific types of assets and transactions enumerated as included in "the Corporation," it is as probable as not that the Maryland tax is condemned by the exemption granted (a) franchises and (b) loans of the H. O. L. C.

(a) The Home Owners' Loan Act of 1933, as amended, requires that the H. O. L. C. loans "shall be secured by a *duly recorded* home mortgage." Section 4 (e), (f), (d), (g); 12 U. S. C. 1463 (e), (f), (d), (g). Both the mortgage and its recordation were thus an indispensable element in the gigantic lending operations of the H. O. L. C. In a very real sense they could not be taxed without tax-

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Edgeman, 73 Okla. 159; *Stout* v. *Van Zante*, 109 Ore. 430; *Union Nat'l Bank* v. *Cook*, 100 S. C. 99; *West* v. *Middlesex Banking Co.*, 33 S. D. 465; *McCammant* v. *Roberts*, 87 Texas, 241; *Azalia* v. *St. Claire*, 23 Utah, 401; *Cochran* v. *Cochran*, 114 Wash. 499; *Tobin* v. *Tobin*, 139 Wis. 494; *Robinson Mercantile Co.* v. *Davis*, 26 Wyo. 484. This general view must have been that intended by Congress in providing a rule for the operations of the H. O. L. C. in all of the states.

[35] See *Des Moines Bank* v. *Fairweather*, 263 U. S. 103, 107; "This section shows, * * * that what Congress intended was that national banks and their property should be free from taxation under state authority, other than taxes on their real property and on shares held by them in other national banks."

ing the H. O. L. C. franchise. See *Osborn* v. *United States Bank*, 9 Wheat. 738, 862; *Morgan* v. *Louisiana*, 93 U. S. 217, 223.

(b) Further, since the Act requires the H. O. L. C. loans to be secured by a duly recorded home mortgage, the Maryland tax on the mortgage when offered for record would seem in every substantial sense to be a tax on the loan itself. As such it is condemned by the exemption of "the Corporation." Indeed, in this particular statute Congress has specifically included "loans" in that exemption. Congress, having declared that the "loan" be exempt, cannot be supposed to have intended that the mortgage security and the recordation, each required of every loan, should be taxable. The chief assets of the H. O. L. C. are its loans; a decision that Congress intended to exempt the loans but not the security required by statute for each loan would impute an irrational nicety of selection to the draftsmen.

Petitioner, it may be noted, concedes that "a direct property tax levied upon the mortgages" would be condemned by Section 4 (c) (Br. 44–45); we see no reason to draw distinctions as to the types of taxes upon mortgages.

2. *The Legislative Background.*—The language of Section 4 (c) seems so plainly to carry exemption from the tax in question that the Court cannot go behind its words. But, even if the legislative intention is searched in the history of the section, the fragmentary legislative background tends to con-

firm rather than to contradict our interpretation of the section. None of the *indicia* of legislative intent are especially persuasive, whether they point in the one direction or the other. We shall, however, set out those which we have found.

(a) The taxation clause of the Home Owners' Loan Act of 1933, Section 4 (c), *infra*, does not differ substantially from that found in several other statutes.[36] Neither the committee reports [37] nor the

[36] Federal Reserve Act, c. 6, Sec. 7, 38 Stat. 251, 258; Federal Farm Loan Act, c. 245, Sec. 26, 39 Stat. 380; Reconstruction Finance Corporation Act, c. 8, Sec. 610, 47 Stat. 5; Federal Home Loan Bank Act, c. 522, Sec. 13, 47 Stat. 735, as amended by Act of May 28, 1935, c. 150, Sec. 8, 49 Stat. 295; Act creating Federal Deposit Insurance Corporation, c. 89, Sec. 12B, 48 Stat. 162, 177, as amended by Section 101 of the Banking Act of 1935, c. 614, 49 Stat. 684, 696, 700; Farm Credit Act of 1933, creating the Central Bank for Cooperatives, the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, c. 98, Sec. 63, 48 Stat. 257, 267; National Housing Act, c. 847, Sec. 402, 48 Stat. 1246, 1256.

[37] Federal Reserve Act: House Rep. No. 69, 63d Cong., 1st Sess., S. Rep. 133, 63d Cong., 1st Sess., Conference Rep. No. 163, 63d Cong., 2d Sess. (51 Cong. Rec. 1352); Federal Farm Loan Act: H. Rep. No. 643, 64th Cong., 1st Sess., S. Rep. No. 144, 64th Cong., 1st Sess., S. Doc. No. 472, 64th Cong., 1st Sess., Conference Rep. No. 844, 64th Cong., 1st Sess. (53 Cong. Rec. 10093); Reconstruction Finance Corporation Act: H. Reps. Nos. 36 and 243, 72d Cong., 1st Sess., S. Rep. No. 1545, 74th Cong., 2d Sess.; Federal Home Loan Bank Act: H. Reps. Nos. 1418, 1775, 1782, 72d Cong., 1st Sess., H. Reps. Nos. 202 and 955, 74th Cong., 1st Sess., S. Rep. No. 438, 74th Cong., 1st Sess.; Act creating Federal Deposit Insurance Corporation: H. Reps. Nos. 150 and 254, 73d Cong., 1st Sess., H. Reps. Nos. 742 and 1822, 74th Cong., 1st Sess., S. Rep. No. 1007, 74th Cong., 1st Sess.; Farm Credit

debates on any of these statutes go very far to illumine the scope of the tax exemption which Congress wished to provide. But the subsequent legislative history of Section 10 of the Reconstruction Finance Corporation Act (c. 8, 47 Stat. 9) affords quite clear indication of the legislative intent. That section[38] is substantially identical with Section 4 (c) of the Home Owners' Loan Act of 1933. In *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209, this Court held the R. F. C. liable to state taxation on its national bank shares because Section 5219 of the Revised Statutes provided that *all* shares of national banks could be taxed. Six weeks later, by the Act of March 20, 1936 (c. 160, 49 Stat. 1185; 12 U. S. C., Supp IV, 51d), Congress amended, not the Reconstruction Finance Corporation Act but the Acts relating to national banks, to exempt the R. F. C. from all such taxation, whether past or future. The Committee reports are completely explicit as to the Congressional understanding of the scope of the exemption

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Act of 1933, creating the Central Bank for Cooperatives, the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives: H. Reps. Nos. 171 and 242, 73d Cong., 1st Sess., S. Rep. No. 124, 73d Cong., 1st Sess.; National Housing Act: H. Reps. Nos. 1922, pt. 2, and 2066, 73d Cong., 2d Sess.

[38] It provides in part: "The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation * * *; except that any real property of the corporation shall be subject to State * * * or local taxation to the same extent according to its value as other real property is taxed."

intended by provisions such as that now under question. We therefore quote at some length the statement of the House Committee on Banking and Currency (H. Rep. No. 1995, 74th Cong., 2d Sess.):

> Section 10 has generally been understood to assert the broadest possible immunity from the burden of taxation for the Corporation, its assets and its operations. This construction follows from the language of the section which confers tax exemption upon "the Corporation," while specifically consenting to the taxation of real property alone. This construction follows also from the material impairment of the Corporation's operation and effectiveness by any burden of State and Federal taxation, for in furtherance of its purposes the corporation has kept its charges at the lowest rates consistent with sound financing.
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> This privilege to tax [in the *Baltimore National Bank* case] has certain unfortunate consequences when applied to activities of the Reconstruction Finance Corporation. Taxation of the preferred shares, notes, or debentures of banks held by the Reconstruction Finance Corporation will not only encroach in all cases upon the small margin between the cost to the Reconstruction Finance Corporation of its money and the return on its investments in banks, but in many cases it will wipe this margin out entirely, impeding the Corporation's operations and leaving it perhaps with an actual substantial loss.

> Moreover, some States do not impose any tax on stock, notes, or debentures of this nature, while the rates in others vary from a small fraction of 1 percent to a percentage which practically exhausts the entire return, bringing an inequality into the relationship of the Reconstruction Finance Corporation and the banks to which it is rendering assistance.
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> * * * * *
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> The committee feels that when Congress enacted section 10 of the Reconstruction Finance Corporation Act, it was intended to give as wide immunity as possible to the functions and activities of the Corporation, and the enactment of the proposed bill will accomplish that intention.

To the same effect, see H. Rep. No. 2199, 74th Cong., 2d Sess.; S. Rep. No. 1545, 74th Cong., 2d Sess.

(b) There is only one legislative indication which we have found which points to an intention to waive the tax immunity which would attach in the silence of Congress. This is the omission in the enumerated immunities of Section 4 (c) of the Home Owners' Loan Act of "mortgages," which is found in the Federal Farm Loan Act.[39] To imply

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[39] Section 26 of that Act (c. 245, 39 Stat. 380; 12 U. S. C. 931) provides:

> Every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom,

for the farm-loan mortgages a unique exemption would seem truly "to infer Congressional idiosyncrasy" (*Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 393). But it may be argued that the failure in Section 4 (c) to provide an express exemption for mortgages, similar to that which dictated the decision in *Federal Land Bank* v. *Crosland*, 261 U. S. 374, would indicate a desire to waive their immunity. Either of two considerations, however, shows that such a superficial analysis would be faulty.

(1) In the first place the immunity of mortgages extended not only to those held by the Federal Land Banks and national farm-loan associations, but also to those held by joint-stock land banks. These banks "are privately owned corporations," and "there is nothing in their organization and powers to suggest that they are government instrumentalities." *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 234. Since Congress wished to exempt these mortgages from taxation when held by joint-stock land banks, it could not rely upon the generalized

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shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate. * * * First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this chapter, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.

exemption provided for the Federal land banks and the national farm-loan associations. There is no comparable situation here.

(2) In addition, both the joint stock and the Federal land banks have power under the statute [40] to rediscount their mortgages. Congress, desiring the broadest immunity in order to benefit the farm borrower, chose to extend the immunity to the private holders of these mortgages. Since the H. O. L. C. mortgages are held only by the Corporation itself, there was no comparable occasion specifically to exempt those mortgages.

(c) A number of statutes, since the enactment of the tax exemption section of the Federal Reserve Act, have followed that general model.[41] The individual statutes, by and large, vary in minor details each from the other. Except for the debate on the Federal Farm Loan Act, the exemption provisions seem not to have been discussed; neither the committee reports nor the debates show any indication that Congress has attached any significance whatever to the shifting phrasing of the formulae.

This is not surprising. The doctrine of intergovernmental tax immunity had, since *Collector* v. *Day*, 11 Wall. 113, been cast adrift from any specific constitutional provision, and as often as not

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[40] See Sections 13, seventh, and 16 of the Federal Farm Loan Act, *supra*.

[41] See footnote 36, *supra*, p. 55.

was placed by this Court on the nebulous footing of constitutional implication. The decisions of the Court with respect to the immunity of private persons who dealt with the Government seemed beyond reconciliation. The decisions upholding the immunity of the Government itself, however, were uniform and beyond doubt. The enactment of the exemption clauses, therefore, could be expected to receive no more than cursory attention: the exemption was declaratory, and its specific basis—whether constitutional or statutory—was elusive. We think it fair to say that every exemption clause, whatever its precise phrasing, was intended to serve merely as an unnecessary notice that the customary tax exemption of the Government would attach.

CONCLUSION

We have shown that Congress has full power either to exempt H. O. L. C. mortgages and their recordation from taxation or to waive the immunity; that if Congress were silent, tax immunity for the H. O. L. C. property and operations would be the rule; and that Congress, instead of remaining silent, has by express enactment, reinforced by inferences from the legislative background, declared that the H. O. L. C. should be exempt from all taxation save that on its real property. For these reasons, we respectfully submit that the

decision of the Court of Appeals of Maryland should be affirmed.

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OCTOBER 1939.

APPENDIX

Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128, as amended:

SEC. 4. (a) The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such bylaws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the board of directors of the Corporation and shall serve as such directors without additional compensation.

* * * * *

(c) * * * The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation

to the same extent, according to its value, as other real property is taxed. (U. S. C., Title 12, Sec. 1463.)

Laws of Maryland, 1937, Special Session, c. 11:

SEC. 4. *And be it further enacted,* That three new sections be and they are hereby added to Article 81 of the Annotated Code of Maryland (1935 Supplement), to be under the subtitle "Tax on the Recordation of Instruments in Writing," said new sections to be known as Sections 213 and 214, to follow immediately after Section 212 of said Article, and to read as follows:

213. A tax is hereby imposed upon every instrument of writing recorded or offered for record with the clerks of the Circuit Courts of the respective Counties, or the Clerk of the Superior Court of Baltimore City, on and after June 1, 1937, to and including September 30th, 1939, including mechanics liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing, so recorded or offered for record, which create liens or incumbrances on real or personal property, or convey title to real or personal property; provided, however, that said tax shall not apply to assignments of mortgages, purchase money mortgages, absolute or partial releases, or orders of satisfaction.

The tax hereby imposed shall be at the rate of 10c for each $100, or fractional part thereof, of the actual consideration paid or to be paid, for the property transferred, in the case of instruments conveying title, and

at the rate of 10c for each $100, or fractional part thereof, of the principal amount of the debt secured, in the case of instruments securing a debt, or reserving title as security for a debt.

In addition to the tax hereby imposed, the Clerks shall collect a charge of 50c for each such instrument recorded or offered for record.

214. No such instrument shall be received for record by any Clerk of the Court unless and until a stamp is affixed to said instrument and canceled. The Comptroller shall supply to the Clerks of the Circuit Courts of the respective Counties or the Clerk of the Superior Court of Baltimore City, stamps to evidence the payment of said tax, for sale to persons offering such instruments for record, under such rules and regulations as the Comptroller may prescribe. The proceeds from the sale of said stamps, together with the recordation charges herein provided, shall be accounted for and paid over to the Comptroller who shall deposit the same in the "State Fund for Aid to the Needy" to be disbursed therefrom for the purposes and in the manner prescribed by law.

It shall be unlawful for any person to record any written instrument referred to in this subtitle without having provided for the payment of the tax and recordation charge as herein provided, and it shall be unlawful for any person to misrepresent the amount of the actual consideration in any such transaction. Any person violating the provisions of this subtitle shall be subject to a fine of not more than $500.00 or to a sentence of not more than six months in jail.

Maryland Acts of 1939, c. 277 (Revenue Act):

SEC. 6. *And be it further enacted,* That Sections 213 and 214 of Article 81 of the Annotated Code of Maryland (1935 Supplement) Title "Revenue and Taxes," subtitle "Tax on the Recordation of Instruments in Writing," as the same were enacted by Chapter 11 of the Acts of the Special Session of 1937, be, and the same are hereby repealed and reenacted with amendments so as to read as follows:

213. A tax is hereby imposed upon every instrument of writing conveying title to real or personal property, or creating liens or incumbrances upon real or personal property, offered for record and recorded * * *. The term "instruments of writing" shall include * * * mortgages * * *.

In the case of instruments conveying title to property, the tax shall be at the rate of 10c for each $100 of the actual consideration paid or to be paid; in the case of instruments securing a debt, the tax shall be at the rate of 10c for each $100 of the principal amount of the debt secured. In addition to the tax imposed, the Clerks shall collect a charge of 50c for each instrument offered for record and recorded, upon which a tax is payable hereunder.

* * * * *

214. No instrument subject to the tax imposed by this sub-title, shall be received for record by any Clerk of the Court unless and until a stamp is affixed to said instrument and canceled. * * *

It shall be unlawful for any person to record any instrument subject to the tax imposed by this sub-title, or to incur any additional debt secured by an instrument

previously recorded, with respect to which additional debt a tax is required to be paid, without having provided for the payment of the tax and recordation charge * * *.

Maryland Code, Annotated, 1924, Vol. 2, Art. 66:

21. On the death of a mortgagee of lands, his interest and estate in the mortgaged premises together with his right to the debt thereby secured shall devolve on and vest in his executor or administrator.

22. The executor or administrator of any mortgagee, or the assignee, or the executor or administrator of any assignee of any mortgagee who is legally and equitably entitled to receive the mortgage debt, or where the mortgage debt has been paid in the lifetime of the mortgagee, may release a mortgage in the same manner and by the same means that a mortgagee can release.

U. S. GOVERNMENT PRINTING OFFICE: 1933

pp. 3, 4, 1;

SUPREME COURT OF THE UNITED STATES.

No. 10.—October Term, 1939.

M. Luther Pittman, Clerk of the Superior Court of Baltimore City, Petitioner,
vs.
Home Owners' Loan Corporation of Washington, D. C.

On Writ of Certiorari to the Court of Appeals of the State of Maryland.

[November 6, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Home Owners' Loan Corporation brought this proceeding in the Baltimore City Court for a writ of mandamus requiring the Clerk of the Superior Court of Baltimore to record a mortgage executed to the Corporation upon the payment of the ordinary recording charge and without affixing stamps for the state recording tax. Demurrer to the petition was overruled, the Clerk did not avail himself of the opportunity to answer; and mandamus was granted. The order was affirmed by the Court of Appeals. — Md. —. We granted certiorari. 306 U. S. 628. 175 512; 2A. 2d 689.

The Maryland statute imposes a tax upon every mortgage, recorded or offered for record, at the rate of ten cents for each $100, or fraction thereof, of the principal amount of the debt secured by the mortgage.[1] As the Home Owners' Loan Corporation is ex-

[1] The Act provides for a "Tax on the Recordation of Instruments in Writing" as follows:

"A tax is hereby imposed upon every instrument of writing recorded or offered for record with the Clerks of the Circuit Courts of the respective Counties, or the Clerk of the Superior Court of Baltimore City, on and after June 1, 1937, to and including September 30th, 1939, including mechanics liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing, so recorded or offered for record, which create liens or incumbrances on real or personal property, or convey title to real or personal property; provided, however, that said tax shall not apply to assignments of mortgages, purchase money mortgages, absolute or partial releases, or orders of satisfaction".

"The tax hereby imposed shall be at the rate of 10¢ for each $100, or fractional part thereof, of the actual consideration paid or to be paid, for the

pressly declared to be an instrumentality of the United States (Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128) and the mortgage was acquired in that capacity, the Court of Appeals held the tax as thus applied to be invalid.

The court relied upon our decision in *Federal Land Bank* v. *Crosland*, 261 U. S. 374. The question there related to a tax imposed by Alabama as a condition for the recording of a mortgage executed to a Federal Land Bank. The Federal Farm Loan Act of 1916 provides that first mortgages executed to Federal Land Banks shall be deemed "instrumentalities of the Government of the United States and as such they and the income derived therefrom shall be exempt from Federal, State, municipal and local taxation": 39 Stat. 360, 380. We held that the state tax, as distinguished from a reasonable fee to meet the expenses of the registry, constituted a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it, and that the tax on the mortgage in question was beyond the power of the State.

Petitioner suggests that the *Crosland* case may be distinguished; that the Alabama tax was imposed on the lender, whereas the Maryland tax is on the privilege of recording the instrument and the statute is silent as to the one who shall pay the tax; also that the Federal Farm Loan Act expressly declared the mortgages of Federal Land Banks to be instrumentalities of the Federal Government. The Court of Appeals thought these differences to be immaterial. As to the first, the court rightly observed that in the *Crosland* case the provision for the payment of tax by the lender was regarded as having no determining significance. We said that "whoever pays it it is a tax upon the mortgage and that is what is forbidden by the law of the United States". 261 U. S., pp. 378, 379. Here, also, the tax is imposed upon the mortgage and is

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property transferred, in the case of instruments conveying title, and at the rate of 10¢ for each $100, or fractional part thereof, of the principal amount of the debt secured, in the case of instruments securing a debt, or reserving title as security for a debt".

"In addition to the tax hereby imposed, the Clerks shall collect a charge of 50¢ for each such instrument recorded or offered for record". Acts of 1937, Chap. 11, Code of Maryland, Art. 81, sec. 213.

The same Act, in Section 214, provides for the affixing of stamps to cover the tax and makes it unlawful for any person to record any written instrument without providing for the payment of the tax, as stated.

graded according to the amount of the loan,[2] and the condition attached to the registration is a practical method of collection. The recording sought was for the protection of the interest of the Home Owners' Loan Corporation. In fact, the mortgage in the instant case was offered for record by the Corporation and the tax was demanded from the Corporation.

The second suggested distinction rests upon the terms of the Home Owners' Loan Act. That provides[3] that the Home Owners' Loan Corporation, its franchise, capital, reserves and surplus, and its loans and income shall be exempt from all state or municipal taxes. The critical term, in the present relation, is *"loans"*. We think that this term, in order to carry out the manifest purpose of the broad exemption, should be construed as covering the entire process of lending, the debts which result therefrom and the mortgages given to the Corporation as security. The Home Owners' Loan Act requires that the loans made by the Corporation "shall be secured by a duly recorded home mortgage".[4] Both the mortgage and its recordation were indispensable elements in the lending operations authorized by Congress. We agree with the state court that there is no sound distinction which makes inapplicable the reasoning which was decisive in the *Crosland* case.

Alive to this consideration, petitioner advances a broader contention, asking us to review and overrule the *Crosland* decision as being out of harmony with correct principle. Petitioner insists that the tax is not discriminatory; that it does not impose a burden upon the Home Owners' Loan Corporation; and that if the Act of Congress be construed as conferring an immunity, it went beyond the power of Congress, as Congress cannot "grant an immunity of greater extent than the constitutional immunity".

We assume here, as we assumed in *Graves* v. *New York ex rel. O'Keefe*, that the creation of the Home Owners' Loan Corporation

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[2] See Note 1. → 306 U.S. 466,

[3] Section 4(c) of the Home Owners' Loan Act provides: "The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed". 48 Stat. 128, 130; 12 U. S. C. 1463.

[4] Section 4(c)(f); 48 Stat. 131; 12 U. S. C. 1463 (c)(f).

was a constitutional exercise of the congressional power and that the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments. *McCulloch* v. *Maryland*, ~~supra, pp.~~ 421, 422; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 208, 209; *Graves* v. *New York ex rel. O'Keefe*, *supra*. Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. "A power to create implies a power to preserve". *McCulloch* v. *Maryland*, *supra*, p. 426. This power to preserve necessarily comes within the range of the express power conferred upon Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. 1, sec. 8, par. 18. In the exercise of this power to protect the lawful activities of its agencies, Congress has the dominant authority which necessarily inheres in its action within the national field. *The Shreveport Case*, 234 U. S. 342, 351, 352. The exercise of this protective power in relation to state taxation has many illustrations. See, e.g., *Bank* v. *Supervisors*, 7 Wall. 26, 31; *Châte* v. *Trapp*, 224 U. S. 665, 668, 669; *Smith* v. *Kansas City Title Co.*, *supra*, p. 207; *Trotter* v. *Tennessee*, 290 U. S. 354, 356; *Lawrence* v. *Shaw*, 300 U. S. 245, 249. In this instance, Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. As we have said, we construe this provision as embracing and prohibiting the tax in question. Since Congress had the constitutional authority to enact this provision, it is binding upon this Court as the supreme law of the land. Const. Art. VI.

The judgment of the state court is affirmed.

Affirmed.

Mr. Justice BUTLER took no part in the consideration and decision of this case.